ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2011-0122
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Pike County
v.	:	Court of Appeals,
	:	Fourth Appellate District
JEFFREY HARDIN,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 10CA803

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case involves the death of a five month-old baby, Jeffrey Hardin, Jr., who died at the hands of his biological father, Jeffrey Hardin, Sr., Defendant-Appellant in this case. The victim died from a subdural hematoma due to nonaccidental head trauma, and his death was ruled a homicide by the Franklin County Coroner, who also indicated that the baby's injuries were caused by either blunt trauma or a shaking mechanism.

The victim was five months old, and was the biological child of Sasha Starkey and Defendant-Appellant. They resided in the Moore Meadows apartment complex in the Village of Piketon, Pike County, Ohio.

The incident giving rise to this case occurred on May 11, 2009. Defendant-Appellant was indicted by the Pike County Grand Jury for one count of Murder, a violation ofSection 2903.02(B) of the Ohio Revised Code, and one count of Endangering Children, a violation of Section 2919.22(B)(1) of the Ohio Revised Code and a Felony of the Second Degree. *State v. Hardin*, Judgment Entry of Sentence, Pike Co. Common Pleas (Jan. 6, 2010)

The case proceeded to trial on December 7-8, 2009. The following testimony and evidence was produced at trial.

On May 11, 2009, the Pike County Sheriff's Office received a 911 call regarding an infant who was not breathing. *State* . *Hardin*, Pike App. No. 10 CA 803 (2010)

Corporal Rick Jenkins, who was the lead investigator in this case, arrived on the scene followed momentarily by Squad 1 of the Pike County Emergency Medical Service, manned by Jerome Holt, who was a paramedic, and Cody Caron, an EMT-Basic.

Holt and Caron both testified at trial. Holt testified that he he was a licensed and certified critical care paramedic through the State of Ohio, and that he had done his pediatric clinical

training through Nationwide Children's Hospital. Holt testified that upon the squad's arrival at the scene that examined the victim. He found the baby to be unresponsive. The victim's skin was pale and that his lips and nails were blue. Holt detected no pulse and no heartbeat. He and EMT-B Cody Carron transported the victim to the emergency room at Pike Community Hospital.

Carron testified that he took the victim from his mother. He further testified that the victim was cold and had no pulse.

Corporal Jenkins testified that he interviewed Defendant-Appellant about the injuries to the victim. He testified that the Defendant-Appellant stated that the victim was crying and would not stop, and that Defendant-Appellant indicated that he shook the victim to get him to stop crying. Defendant-Appellant further told Corporal Jenkins that he was upset with the victim's crying. Defendant-Appellant further made a statement that "I, Jeff Hardin, was having trouble with my son of 5 months. I had shake…I had shuck [sic] him a couple of times. After that he started crying and fell asleed. He quit breathing." Defendant –Appellant had stated tht he tried to get the victim to sleep by placing him on the sofa and shaking the cushions.

Investigator Rob Smith of the Pike County Prosecutor's Office testifed to a similar statement he took from the Defendant-Appellant. *State . Hardin*, Pike App. No. 10 CA 803 (2010), p.3.

The victim was transported to the Emergency Room at Pike Community Hospital, where he was examined by Dr. Alice Frazier. He was stabilized and transported to the Nationwide Children's Hospital in Columbus.

While at Nationwide Children's Hospital, the attending physicians, in conjunction with the victim's mother, made the decision to terminate the victim's life support due to the inability to restart the victim's respiration. *State . Hardin*, Pike App. No. 10 CA 803 (2010), p.2.

The autopsy of the victim was performed by the Franklin County Coroner's Office. The actual autopsy was performed by Dr. Steven Sohn and reviewed by Dr. Jan Gorniak , the elected Coroner of Franklin County. Dr. Gorniak also approved the autopsy report itself. Dr. Gorniak herself testified at the trial, due to Dr. Sohn having left employment at the Franklin County Coroner's Office. Dr, Gorniak testified as to her own opinion as to the cause of death of the victim, which was a subdural hematoma due to nonaccidental head trauma. She also testified that in her opinion the victim's death was a homicide and that the injuries were cause by either blunt force trauma or a shaking mechanism. Both Dr. Gorniak's testimony and the autopsy report was admitted at trial over objection. *State* . *Hardin*, Pike App. No. 10 CA 803 (2010), p.3.

Dr. Philip Scribano, the medical director of the Nationwide Children's Hospital's Center for Child and Family Advocacy, testified that he reviewed the medical records, x-rays and other information regarding the victim, and that the the injuries to the victim "could not have been caused through the manipulation of sofa cusions" as described by the Defendant-Appellant, and that those injuries could only have been caused by significantly more force than described. Defendant. Dr. Scribano's testimony was admitted over objection. *State* . *Hardin*, Pike App. No. 10 CA 803 (2010), p.3.

The trial court found Defendant-Appellant guilty of both counts of the indictment, and sentenced him to prison for the mandatory period of fifteen years to life for the Murder, RC2903.02(B), and a concurrent six (6) year term for the Endangering Children, RC 2919.B(1).

Defendant-Appellant appealed this conviction to the Fourth District Court of Appeals, who upheld these convictions in a decision dated December 10, 2010. Defendant-Appellant asserted two grounds for appeal:

1. "When the court admitted the reports of multiple attending physicians and medical technicians without their testimony, Mr. Hardin's right to confront his accusers was violated."

2. "The trial court erred by allowing expert testimony when the experts had neither directly perceived the facts leading to thaier opinions nor was the information underlying their opinions otherwise admissible."

Both assignments of error were overruled. The autopsy report was held admissible due to it being a public record under seal and therefore self-authenticating. Dr. Gorniak's testimony based on her own conclusions from the report was therefore admissible. The admission of Dr. Scribano's testimony, becaused he relied on reports other than the autopsy report, was held to be harmless error.

Defendant-Appellant timely appealed to the Ohio Supreme Court. The Court accepted the case due to it concerning a substantial constitutional question. Briefing was stayed awaiting a decision in in *State v. Craig*, Case No. 2006-1806 ("Craig II"), but later reinstated, and now the case is before this Court for review.

ARGUMENT

State of Ohio's Response to Appellant's Proposition of Law: Autopsy reports are nontestimonial in nature. Their admission at trial does not violate the Confrontation Clause, and an expert witness who did not prepare the report may still testify as to her opinion based upon facts and information contained in that report.

A. An autopsy report is a nontestimonial business record.

Autopsy reports have long been admissible as business records under Evidence Rule 803(8) of the Ohio Rules of Evidence. Evidence Rule 803(8) states as follows:

> (8) Public records and reports.
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

Public records and reports are hearsay exceptions, due to their inherent trustworthiness. An autopsy report falls under both Evidence Rule 803(8)(a) and (b). An autopsy report is a record and a report that sets forth the activities of the Coroner's Office, one of those activities being the performance of autopsies. This is the type of activity contemplated by Evidence Rule

803(8)(a). An autopsy report is also, as contemplated by Evidence Rule 803(8)(b), a matter observed pursuant to a duty imposed by law and which tere was a duty to report. Coroners are required by law to perform autopsies under certain circumstances. See Sections 313.121 and 313.131 of the Ohio Revised Code.

This Court itself has held that autopsy reports are admissible as nontestimonial public records. *State v. Craig*, 110 Ohio St. 3d 306, 853 N.E.2d 621, 2006 Ohio LEXIS 2622, 2006 Ohio 4571, (2006), writ of certiorari denied by 549 U.S. 1255, 127 S. Ct. 1374, 167 L. Ed. 2d 164, 2007 U.S. LEXIS 2714, 75 U.S.L.W. 3456 (2007).

Despite this, Defendant-Appellant argues that autopsy reports are testimonial in nature. To understand why autopsy reports are nontestimonial, it is necessary to review how and why they are created.

Autopsy reports are prepared by the office of and under the purview of the County Coroner. Coroners are governed by Chapter 313 of the Revised Code.

Under Section 313.09 of the Revised Code, coroners "shall keep a complete record of and shall fill in the cause of death on the death certificate, in all cases coming under his jurisdiction.....The report of the coroner and the detailed findings of the autopsy shall be attached to the report of each case."

Section 313.10(A)(1) specifically establishes a coroner's records, including autopsy reports, as public records, and reads as follows:

> (A) (1) Except as otherwise provided in this section, the records of the coroner who has jurisdiction over the case, including, but not limited to, the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations filed in the office of the coroner

under division (A) of section 313.13 of the Revised Code, made personally by the coroner or by anyone acting under the coroner's direction or supervision, are public records. Those records, or transcripts or photostatic copies of them, certified by the coroner shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in those records. The coroner of the county where the death was pronounced shall be responsible for the release of all public records relating to that death.

Section 313.123(A)(1) defines the term autopsy.

(A) (1) As used in this chapter, "autopsy" means the external and internal examination of the body of a deceased person, including, but not limited to, gross visual inspection and dissection of the body and its internal organs, photographic or narrative documentation of findings, microscopic, radiological, toxicological, chemical, or other laboratory analyses performed in the discretion of the examining individual upon tissues, organs, blood, other bodily fluids, gases, or any other specimens and the retention for diagnostic and documentary purposes of tissues, organs, blood, other bodily fluids, gases, or any other specimens as the examining individual considers necessary to establish and defend against challenges to the cause and manner of death of the deceased person.

The Confrontation Clause, contained in the Sixth Amemdment to the U.S. Constitution, states that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In 2004, the United States Supreme Court decided the case of *Crawford v. Washington*, 41 U.S. 36 (2004), which dramatically altered the way out-of court statements are treated in criminal prosecutions. The criminal justice system is still experiencing the repercussions of *Crawford* even today, nine years after the decision. This appeal can, ultimately, be traced back to the decision in *Crawford.*

Prior to Crawford, the admissibility of out-of court statements was governed by the Rules of Evidence, particularly Evidence Rule 803 here in Ohio. Provided that an out-of-court statement was covered by an exception to the hearsay rule, there was no Sixth Amendment Confrontation Clause violation. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

Crawford completely altered the framework for the admissibility of out-of -court statements. , creating two classes of out-of-court statements; testimonial and nontestimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, an out-of-court testimonial statement violates the Confrontation Clause. A testimonial statement is a statement whose main purpose is to substitute for a witness's actual testimony at trial. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). An example would be a recorded interview of a witness who observed a crime take place , and which recording is sought to be played in court by the State instead of having that witness appear and testify subject to cross-examination.

Nontestimonial hearsay does not violate the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006).

This Court examined the admissibility of autopsy reports in light of *Crawford* when it decided *Craig*. The facts in *Craig* are very similar to the facts in this case. In *Craig*, an autopsy was performed by a pathologist who had retired from the office at the time of trial. The Summit

County Coroner herself , Dr. Kohler, testified as an expert and based her opinion on the autopsy report prepared by the nontestifying pathologist.

This Court held that : "We agree with the majority view under *Crawford* and conclude that…autopsy records are admissible as nontestimonial business records. We conclude that Dr. Kohler's expert testimony about the autopsy findings, the test results, and her opinion about the cause of death did not violate Craig's confrontation rights." *State v. Craig*, 110 Ohio St. 3d 306, 853 N.E.2d 621, 2006 Ohio LEXIS 2622, 2006 Ohio 4571, (2006), writ of certiorari denied by 549 U.S. 1255, 127 S. Ct. 1374, 167 L. Ed. 2d 164, 2007 U.S. LEXIS 2714, 75 U.S.L.W. 3456 (2007).

This Court held in *Craig* that "An autopsy report, prepared by a medical examiner and documenting objective findings, is the "quintessential business record."", quoting a Maryland case, *Rollins v. State* (2005), 161 Md.App. 34, 81, 866 A.2d 926. Additionally, in making its decision in *Craig*, it referred to a New York case which stated:

> "The essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' not prepared for litigation." *People v. Durio* (2005), 7 Misc.3d 729, 734, 794 N.Y.S.2d 863.

Autopsy reports, therefore, are nontestimonial business records because they are prepared by the coroner in the ordinary course of business. The business of the coroner, which is required by the Ohio Revised Code, is to determine a deceased's cause of death, and to file a death certificate containing that cause of death. R.C. 313.09. In determining that cause of death, the

coroner may and in certain cases shall conduct an autopsy of the deceased, a duty imposed by law. See RC 313.121 and 313.131. Even though the information obtained through a thorough autopsy, and recorded in the an autopsy report, can be very advantageous to police and prosecutors during investigations, a criminal investigation is not an autopsy report's primary purpose. In this case, the Frankin County Coroner would have performed an autopsy regardless of whether Appellant or anyone else had ever been been suspected of killing the victim. The exesistence or nonexistence of a criminal investigation was irrelevant to the duty imposed upon the coroner to perform an autopsy.

In regard to the preparation of autopsy reports, a coroner is not making any conclusions or opinions as to the identity of any possible suspects, or whether a suspect even exists. There appears no be no authority exists for a coroner to determine who may have caused a particular death or whether any laws have been broken. That is the province of police agencies. An autopsy report itself contains nothing about suspects.

Appellant argues that *Craig* is no longer good law in light of recent U.S. Supreme Court decisions. This is simply not the case. The three most important recent decisions regarding reports and the Confrontation Clause are: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*,131 S. Ct. 2705 (2011) and *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

Melendez-Diaz dealt with laboratory reports of drug analyses. *Bullcoming* dealt with blood analysis reports in an OVI/DUI case, and *Williams* dealt with DNA lab reports. None of these type of reports are at issue in this case.

In *Melendez-Diaz*, a quantity of cocaine was seized by the Boston Police Department, sent to the crime lab, analyzed and found in fact, to be cocaine. In place of live testimony of the

analyst, "certificates of analysis" were admitted in to evidence. These certificates of analysis were essentially sworn affidavits from the individual who performed the test. The court found that this violated the confrontation clause, as these certificates of analysis were testimonial and prepared solely for the purpose of trial. *Melendez-Diaz.* The Massachusetts procedure at issue in *Melendez-Diaz* appears very similar to Ohio's procedure for laboratory reports under Section 2925.51(A) of the Ohio Revised.Code. One important point in the Melendez decisiion is this:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

In *Bullcoming*, a blood sample was seized from a defendant and sent to the crime lab for testing. The analyst who ran the test prepared a certificate that contained the results of his analysis. The analyst did not testify at trial. The certificate of analysis was admitted through another analyst at the lab who was not involved in the analysis. The U.S. Supreme Court held these certificates of analysis to be testimonial because the only reason that they were ever created in the first place was to be used as evidence at trial against the suspect. *Bullcoming*, 131 S. Ct. at 2717.

In *Williams v. Illinois*, No. 10-8505 (Dec. 2012),the U.S. Supreme Court dealt with the admission of a DNA laboratory report from Cellmark Diagnostics as a business record and subsequent testimony by an expert who did not prepare the report. The Court was divided as to the issue and issued no clear majority opinion issued. However, a plurality of the Court (Justice

Thomas concurred in the judgment only, with Justices Scalia, Kagan, Sotomayor and Ginsburg dissenting), Justice Alito writing for the plurality, and joined by Chief Justice Roberts, and Justices Kennedy and Breyer, held that:

> Even if Cellmark's report had been introduced for its truth, there would have been no Confrontation Clause violation. The Clause refers to testimony by "witnesses against" an accused prohibiting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (a) out of court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) formalized statements such as affidavits, depositions, prior testimony, or confessions. In both *Melendez-Diaz* and *Bullcoming*, these reports were made solely for the purposes of a criminal investigation. Had not either suspect been apprehended and investigated for criminal activity, there would have been no laboratory analysis in either case....The forensic reports in *Melendez-Diaz* and *Bullcoming* ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving a particular defendant's guilt. *Williams v. Illinois*, No. 10–8505 (2012).

Williams is only a majority in the judgment. The plurality opinion led by Justice Alito suggests that autopsy reports would not be testimonial. Because the U.S. Supreme Court has not issued a clear mandate upon the issue of autopsy reports, this Court's decision in *Craig* remains good law, and Dr. Sohn's autopsy report remains admissible as a nontestimonial business record.

B. A coroner who did not prepare an autopsy report may testify as to her opinion based upon facts and information contained in that report without triggering a violation of the Confrontation Clause.

Dr. Gorniak's role in this case was not as some mere "surrogate witness" as suggested by Appellant. Her role as the elected Coroner of Franklin County includes the supervision of the entire office, including Dr. Sohn, who conducted the autopsy. Dr. Gorniak herself prepared and signed the coroner's report and the death certificate of the infant victim in the case. She testified at the trial and gave her own opinion as to both the cause and the manner of the victim's death. She was personally and actively involved in those determinations before the autopsy, coroner's report and death certificate were ever prepared. Trial Tr. 88-89. She in no way acted as a surrogate witness as was the case in *Melendez-Diaz* and *Bullcoming*.

As *Craig* is still good law, the autopsy report she used to formulate her own opinions and from which she testified was properly admitted by the trial court.

There was also no Confrontation Clause violation because Appellant had an ample opportunity to, and in fact did cross-examine Dr. Gorniak as to her own opinions. Trial Tr. at 106-15, 125-126, 129-31. Again, this is not the mere rote recitation of a laboratory report that was at issue in Melendez-Diaz and Bullcoming.

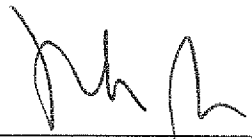
Therefore, Dr. Gorniak's testimony and opinions were properly admitted by the trial court.

CONCLUSION

The Franklin County Coroner's autopsy report is and has never ceased to be anything but a nontestimonial business record as contemplated by Craig. Craig was decided after Crawford v. Washington. None of the post-Crawford United States Supreme Court cases, particularly Melendez-Diaz, Bullcoming, and Williams, alter the autopsy report's status as a nontestimonial business record. Because of the report's status in this case as such a nontestimonial business record, Dr. Jan Gorniak, the actual Franklin County Coroner herself, who had a role in the report's preparation, was properly allowed to testify as to her own expert opinion based upon the information contained in that report.

There is no Confrontation Clause violation present in this case. Both the autopsy report and Dr. Gorniak's testimony were properly admitted. Therefore, the judgment of the Fourth Disctict Court of Appeals, upholding Appellant's conviction for the crimes of Murder and Endangering Children for the death of his infant son, should be affirmed.

Respectfully Submitted,



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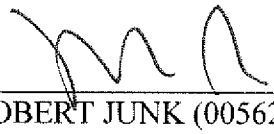

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